UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

STEPPENWOLF THEATRE COMPANY[1]

Employer

And

THEATRICAL STAGE EMPLOYEES UNION, LOCAL NO. 2, I.A.T.S.E. AND UNITED SCENIC ARTISTS, LOCAL USA-829, I.A.T.S.E.

Joint Petitioners

Case 13-RC-20942

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(*c*) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(*b*) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization(*s*) involved claim(*s*) to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(*c*)(*1*) and Section 2(*6*) and (*7*) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(*b*) of the Act:[5]

All full time and regular part time production employees including carpenters, electricians, scenic artists (painters), properties employees, sound employees, costume employees, wardrobe employees, and running crew employees, employed by the Employer at its facilities currently located at 1650 North Halstead, 1010 North Kolmar and 758 West North Avenue, Chicago, Illlinois; but excluding all office clerical employees, confidential employees, interns, temporary employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(*s*) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(*s*) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the

commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Theatrical Stage Employees Union, Local No. 2, I.A.T.S.E. and United Scenic Artists, Local USA-829, I.A.T.S.E., jointly.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994).** Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before **April 10, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570.** This request must be received by the Board in Washington by **April 17, 2003**.

DATED April 3, 2003 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing.

2/ The arguments advanced by the parties at the hearing and in their briefs have been carefully considered.[i]

3/ The Employer is a corporation engaged in operating a theater production and educational training business.

4/ The hearing in this matter convened to address issues involving the Employer raised in Case 13-RC-20942 filed by the Theatrical Stage Employees Union, Local No. 2, I.A.T.S.E. ("Local 2") and Case 13-RC-20953 filed by the United Scenic Artists, Local USA-829, I.A.T.S.E. ("Local 829"). During the hearing, Local 829 withdrew its petition in Case 13-RC-20953 and became a joint petitioner with Local 2. For convenience, Local 2 and Local 829 will be collectively referred to as the Joint Petitioners.

5/ The Joint Petitioners seeks to represent a unit of all full time and regular part time production employees employed by the Employer in the above-described unit.

The Parties' Contentions

The Employer and the Joint Petitioners are in agreement with respect to the job classifications of employees that should be included in the appropriate unit. However, they disagree with respect to certain collateral issues that affect the composition of the appropriate unit. The Employer contends that five of the six employees who function as department heads are supervisors within the meaning of the Act. The Joint Petitioners, on the other hand, contend that the department heads are not statutory supervisors. The Employer also contends that the employees who work for the Costume Exchange should be included the appropriate unit either because they are actually employees of the Employer or because the Employer and the Costume Exchange are joint employers. The Joint Petitioners urge that the Costume Exchange employees should be excluded from the unit. The parties are in agreement that interns should be excluded from the unit. Further, the Employer contends that one intern, who works for Employer pursuant to a grant, is actually a temporary employee and should be excluded from the appropriate unit. In their post-hearing brief, the Joint Petitioners seek to exclude the assistant to the production manager contending that she does not share any community of interest with the other employees in the unit and is otherwise outside the included job classifications. The parties also disagree about which formula should be used to determine the eligibility of part time employees to vote in the election. The Joint Petitioners contend that the proper formula is the one relied on by the Board in *Davison-Paxson Co.*, 185 NLRB 21 (1970), while the Employer urges the use of the formula in *Julliard School*, 208 NLRB 153 (1974). Finally, the parties differ with respect to the adequacy of the Showing of Interest and how it should be measured.

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[i] After the parties filed their post-hearing briefs, the Employer submitted a letter dated March 20, 2003 that appears to take issue with arguments made by the Joint Petitioners in their brief. Thereafter, on March 21, 2003, the Joint Petitioners filed a Motion to Strike Employer's "Response" Brief. Pursuant to Section 102.67(a) of the Board's Rules and Regulations, no reply brief may be filed except upon special leave of the Regional Director. Because the Employer's letter of March 20, 2003 appears to be a reply brief that was filed without first seeking to obtain special leave to do so, I hereby grant the Joint Petitioner's Motion. The Employer's reply brief of March 20, 2003 is hereby stricken from the record.

Based upon the record as discussed below, I find that the unit described above is an appropriate unit for collective bargaining. I further find that the grant-funded intern is a temporary employee and should be excluded from the unit. Similarly, based upon the evidence contained in the record, I find that the department heads for the scenery, electric, properties, and wardrobe/costume departments, are supervisors within the meaning of Section 2(11) of the Act. I shall exclude the employees of the Costume Exchange because they are not employees of the Employer or, even assuming arguendo that the Employer is a joint employer with Costume Exchange, they do not share such a degree of community of interests with unit employees to require their inclusion in the petitioned for unit. I further find that the proper formula to use in determining employees eligibility to vote is the one relied on by the Board in *Julliard School.* Finally, I find that the Showing of Interest is an administrative matter not subject to litigation in this proceeding. However, because I have found that the appropriate unit is larger than the unit sought by the Joint Petitioners, I shall allow the Joint Petitioners additional time to provide the requisite showing of interest.

FACTS

The Employer is engaged in the business of producing stage theatrical productions and providing educational opportunities through an arts exchange educational program, an actor-training program, and the mentoring of actors, artists, theatrical professionals, and technical people. The Employer operates on a budget of $10,000,000 per year of which 60% is generated by ticket sales and the remaining 40% is derived from charitable contributions. Policy decisions for the Employer are made by a 37-member "Ensemble" group of actors and directors who are employed on a part time basis.

Business operations are conducted from several locations in Chicago, Illinois. The Employer's facilities include a main stage theater that provides seating for about 510 people, a studio theater with seating for 180, and a garage theater with seats for about 100. The main and studio theaters are located at 1650 N. Halstead which location also includes the box office and telemarketing operations. The garage theater is located in a parking facility located a few blocks away at 758 West North Avenue which is also the site of the Employer's administrative offices and a rehearsal hall. In addition to these buildings, the Employer uses a 67,000 square feet shop facility at 1010 North Kolmar where the various stage sets used in the productions are assembled. The shop is where the sets are produced by the carpenters and painted by the scenic artists. Various props are assembled here as well. The costume shop, where the actors' wardrobes for the productions are made, is located in the same building as the administrative offices.

The Employer produces 5 shows per year at the main stage lasting eight to nine weeks in length. In the studio theater, the Employer has 4 productions per years that last from four to five weeks. There are four productions per year at the garage theater that also run four to five weeks long. In addition, the Employer stages two productions per year that is educational in nature in its Arts Exchange program for high school students with each lasting about four to five weeks in length. These are held at the main stage

theater. The Employer operates year round with performances taking place during 48 to 50 weeks of the year. In calendar year 2002, the Employer produced 14 shows.

Shows are produced in an "assembly line" fashion. The production people build the sets, make props, and create costumes for each show. In addition, the production employees are involved in what are termed "load-ins" when a stage is set up for the next show, followed by the technical rehearsal. Then, the show runs to completion and the "load-out", when the stage is disassembled and removed to make room for the next production, takes place. The production crew includes employees who work in the carpentry, scenic artists (painters), properties, costumes/wardrobe, electrics, sound, and "running crew" departments. The Employer's "core staff" consists of 19 full time employees who perform the bulk of the work in connection with the various show productions. Due to budgetary constraints that prevent a larger full time staff and because of the numerous tasks involved in the various productions, the Employer utilizes the assistance of part time employees to supplement its regular workforce. Part time employees are drawn from a pool of employees that have previously worked for the Employer on a regular basis. These part time employees perform about 30% of the work that must be accomplished to produce a show. Part time employees sometimes work one or two days and then are not needed for a period of time, while others may work more hours per week or are used on a more frequent basis. The record shows that normally, a part time employee has a high likelihood of continuing future employment. In time, many of the part time employees fill vacancies in the full time staff. The part time employees work with the full time employees in the same locations, do the same jobs utilize the same skills, and use the same tools and materials as the full time employees. In addition, the part time employees have the same lunch and rest breaks as full time employees and is covered by the same Employer policies. Also, the part time employees are invited to the same social events as the full time employees and have the same privileges regarding discounts on tickets and other purchases as well as access to parking, the library and other resource areas. However, unlike full time employees, part time employees do not receive paid holidays, sick days or vacation. Further, only those employees who work over 1000 hours per year are entitled to participate in the Employer's 401k plan.

All of the production crew departments, except for the costume/wardrobe department, report to the scenery shop to work. The wardrobe department is housed in the administrative office building at 758 W. North Avenue. Also located in this facility is the "Costume Exchange". The Costume Exchange is a corporate entity apart from the Employer. The Costume Exchange employees use the Employer's equipment and materials to produce the costumes needed for the various productions. Although not clear from the record, it appears that the Employer employs two people in its costume/wardrobe department. This includes department head Caryn Klein and design assistant Jennifer Roberts. From the record it appears that Klein is also the owner and manager of the Costume Exchange. The Costume Exchange supplements the Employer's costume shop by acting as a type of jobber that is contracted by the Employer to assist in making the wardrobe for the Employer's productions. It appears that there may be two employees who are employed on a regular basis by the Costume Exchange. The record

also shows that the Costume Exchange employees are not paid by the Employer, and that the Employer does not establish any of the terms and conditions of employment that apply to them. Rather, the Employer pays Klein for the job and she in turn pays her employees.

The employees in the carpentry department build the sets used in the production and assist in the production of props. Set designers who are not a part of the production staff create the sets. The electricians wire the set for lighting and other items including special effects. The paint department employees (scenic artists) paint the sets built by the carpenters. The sound department employees are responsible for the soundscape of the production. Occasionally, carpenters help hang the speakers needed for the show. The properties' department employees provide the props used in a production. Similarly, the costume/wardrobe department produces the costumes worn by the actors. Finally, the running crew provides the manpower required to perform various tasks during a production. The house carpenter supervises the running crew. The crew itself may include the stage carpenter, a scenery representative, an electrician to run the light board and an audio person to run the soundboard.

THE ISSUES AND LEGAL ANALYSIS

The parties are in agreement with respect to the classifications of employees to be included in the appropriate unit. However, there are certain collateral issues raised by the parties that pertain to the appropriate unit that I will now address. These issues concern the supervisory status of certain production crew department heads; whether to include the Costume Exchange employees, the temporary employee who is working pursuant to a grant, and the assistant to the production manager in the appropriate unit; what formula to use to determine the eligibility of part time employees to vote in the election, and a showing of interest issue raised by the Employer. The discussion and my decision regarding these matters are set forth below.

The Supervisory Status of Department Heads.

The Employer contends that the following department heads are supervisors as defined by the Act: Robert McGarvie ("McGarvie"), technical director for the Scenery Department (carpentry and scenic artists); James Lichon (Lichon"), Properties; J.R. Lederle ("Lederle"), Electrical; Martha Wegener ("Wegener"), Sound; and Caryn Weglarz-Klein ("Klein"), Wardrobe/Costumes. The Joint Petitioners contend they are not supervisors. Another employee, Rick Haefele ("Haefele"), who works in the Scenery Department as a carpenter was referred to in the record as a department head. However, none of the parties contends that he is a supervisor within the meaning of the Act.

Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

> reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of these types of authority is sufficient to confer supervisory status; however, it is well settled that such authority must be exercised "with independent judgment on behalf of management and not in a routine or sporadic manner" (Citation omitted), *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990); *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000). The exercise of some supervisory authority "in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee." (Citation omitted). *Bowne of Houston, Inc*., 280 NLRB 1222, 1223 (1986); *Clark Machine Corp*., 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of directions; between effective recommendation and forceful suggestion; and between appearance of supervision and supervision in fact. *See*, *Chevron Shipping Co.,* 317 NLRB 379 (1995); *J.C. Brock Corp*., 314 NLRB 157 (1994). Because the statute is ambiguous as to the degree of discretion required for supervisory status, it is within the Board's discretion to determine the issue. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, *slip op*. at 1-2 fn. 3; *Dynamic Science, Inc*., 334 NLRB No. 57 slip op. at 1 (2001).

The burden of demonstrating supervisory status rests on the party seeking to establish that status. *Kentucky River*, 532 U.S. at 710; *Alois Box Co*., 326 NLRB 1177 (1998). Moreover, in the event that "the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusionary evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittendon Hospital*, 328 NLRB 879 (1999), or testimony, *Sears Roebuck & Co*., 304 NLRB 193 (1991), is insufficient to establish supervisory status. Thus where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by such general words or whether an individual engaging in those activities is required to exercise independent judgment.

The evidence shows that all of the department heads are salaried employees and attend regular department head meetings every two weeks and a total of 30 to 40 meetings per year including special meetings. The department heads are in charge of the day-to-day operations of their various departments. McGarvie is referred to as a technical director and is the department head for the Scenery Department that includes him and four full time staff carpenters. In addition, there are two part time employees who have worked regularly for 52 weeks during the past year. To supplement this staff in changing from one production to another, McGarvie brings in up to four additional

part time employees. McGarvie selects these part time employees from the pool of part timers and determines how much they will be paid within a pay range set by the Employer. In addition, McGarvie is also responsible for the scenic artists who generally paint the sets during the last two or three weeks before the set is needed for a production. The Employer does not employ any full time scenic artists. Rather, the scenic artists are part time employees and are selected by McGarvie from a pool of part time painters.

Lichon is the department head in charge of the Properties Department (props). There are three full time employees in the Props Department, although the record is not clear whether this number includes Lichon. When Lichon needs to call in additional help to supplement his full time staff, he determines how many he needs and consults with the production manager regarding the number of part timers he intends to call in. Once he is authorized by the production manager to bring in the part time employees, Lichon selects them from the part time employee pool for properties and calls them to come in. In addition, Lichon determines the pay rate for each part time employee he calls in within the pay range established by the Employer. When the work is winding down and they are no longer needed, Lichon determines when to send the part time employees home. Lichon directs the props department employees in their day-to-day activities.

Lederle is the master electrician and the department head for the Employer's electrical department. There are two full time staff members of the Electrical Department including Lederle. During changeovers from one production to another additional help is needed for various tasks like hanging lights in preparation for a new show. When additional manpower is needed, Lederle determines the number needed, in consultation with the production manager. Generally, he calls in eight part time employees from the pool of part timers to supplement his full time staff. It appears from the record that Lederle has the authority to set or at least effectively recommend the pay rates for the part time employees he calls in.

Wegener is the department head for the Sound (audio) Department. There are two full time Sound Department employees. Wegener is the person who calls in any part time employees needed to supplement the full time sound staff from a pool of part time employee.

Finally, Klein is the costume shop manager and the Employer's department head for the wardrobe/costume department. In addition to Klein, there is one other full time employee directly employed by the Employer in its costume department. There is one full time wardrobe employee. The record shows that from time to time Klein determines whether to call in supplemental staff to assist the costume department and how many part time employees to call in. She then selects and calls them from the pool of part time employees. Klein determines when to send these part time employees home when their services are no longer needed. It also appears that Klein decides whether to use her Costume Exchange employees to perform costume work for the Employer's production.

Based on the record, I find that McGarvie can effectively determine the number of part time carpenters and scenic artists he needs, selects them and sets their pay rates of

the carpenters. Similarly based on the record, I find that Lichon has the authority to effectively determine the number of part time properties department part time employees to call, who to call in, sets their pay rate, and decides when to send them home. Like wise, the record shows and I find that Lederle has the authority to effectively determine how many part time electricians to call, selects them from the part time pool and decides when they are no longer needed. Finally, the record shows, and I find, that Klein has the authority to hire part time employees from the Employer's pool of part timers and decides how many employees to hire. She decides whom to call and when to send them home. The record shows and I find that McGarvie, Lichon, Lederle, and Klein exercise their own independent judgment in performing these functions. Accordingly, I find that McGarvie, Lichon, Lederle, and Klein are supervisors within the meaning of Section 2(11) of the Act and are ineligible to vote in the election.

With respect to Audio department head Wegener, the Employer contends that she is a supervisor and should be excluded from the unit. However, I find that the record evidence is insufficient to establish that Wegener is authorized to use or exercises any supervisory authority within the meaning of Section 2(11) of the Act. There are only two short references to Wegener in the record, and they merely show that she calls in part time employees when they are needed for the Audio department. The record does not show who makes the decision to call in extra employees for the Audio department, what Wegener's input is into such a decision, or the selection process regarding who to call in. The record does not show that she is involved in setting the wage rate for the employees called in or that she is involved in the decision to lay-off the extras. Because the burden of demonstrating supervisory status rests on the party seeking to establish that status, *Kentucky River*, 532 U.S. at 710, I find that the Employer has failed to meet its burden of proof regarding Wegener's alleged supervisory status. Accordingly, based upon this record, I find that Wegener is not a supervisor as defined by the Act, and shall include her in the appropriate unit.

The Costume Exchange employees

The Employer seeks to include the employees who are employed by the Costume Exchange and perform work for the Employer's costume department in connection with the Employer's productions while the Joint Petitioners seek to exclude these employees from the appropriate unit. The Employer contends that the two employees who work directly for Costume Exchange owner Caryn Klein are actually employees of the Employer. In the alternative, the Employer contends that it is a joint-employer of the Costume Exchange employees. For the following reasons, I find that the employees of the Costume Exchange should not be included in the appropriate unit.

The record shows and I find that the Costume Exchange is a separate corporate entity from the Employer, and has different ownership than the Employer. Klein employs and supervises individuals of her own choosing to work for her at the Costume Exchange in performing jobs for the Employer or other entities. The number of employees of the Costume Exchange can vary from zero to 10 at any given time. It appears that Klein establishes their pay and benefits. The Costume Exchange employees work in the Employer's costume shop facility and use machines owned by the Employer.

However, if working on a job for another entity, the Costume Exchange supplies its own materials. When doing a job for the Employer, Klein is given a budget and hires employees in accordance with the needs of the project. The record does not show that other than setting the budget for the use of Costume Exchange employees that the Employer has any meaningful input concerning the pay, benefits, or other terms and conditions of employment of the persons directly employed by the Costume Exchange. In addition to running the Costume Exchange, Klein is the costume shop manager for the Employer. Based on the record, I find that the employees of Costume Exchange are not employees of the instant Employer. Rather, it appears that Costume Exchange is a jobber for the Employer.

Even assuming arguendo, that the Employer and Costume Exchange were joint employers of the Costume Exchange employees, I would find that they do not have such a degree of community of interest with the employees in the petitioned for unit to require their inclusion. Under *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), in a user-supplier employer situation, the question of whether a supplier employer's employees must be included in a unit with the user employer's own employees turns on community of interest factors. Here, the Joint Petitioners do not seek to include the employees of Costume Exchange in the unit, and the record demonstrates that there is sufficient diversity in the community of interest between the petitioned for unit employees and the Costume Exchange employees, that the petitioned for unit is appropriate without the inclusion of the Costume Exchange employees. *See, Lodgian, Inc. d/b/a Holiday Inn City Center*, 332 NLRB No. 128, fn. 2 (2000).

The "Grant" Intern

The test for determining whether an individual designated as a temporary employee may vote depends on their tenure of employment. Under Board law, where an individual is employed for one job only, or for a set duration, or has no substantial expectancy of continued employment and has been notified of this fact, and there is no history of re-calls, such employees are excluded from the appropriate unit as temporary employees and are ineligible to vote. If the employee's prospect of termination is sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment, the employee may not vote. *MJM Studios of New York,* 336 NLRB No. 129 (2001); *Boston Medical Center Corporation*, 330 NLRB 152 (1999); *Indiana Bottled Gas Co.*, 128 NLRB 1441 fn. 4 (1960); *E.F. Drew & Co.*, 133 NLRB 155 (1961).

The record shows that Beth Heerman ("Heerman") is employed pursuant to a grant as the Employer's special effects coordinator. The grant expires on May 28, 2003 at which time her employment with the Employer will come to an end. Accordingly, based upon the record, I find that Heerman was hired for a set duration and that she has no reasonable expectancy of continued employment beyond the expiration of the grant. I further note that at the hearing the parties agreed that the interns should be excluded from the appropriate unit. Therefore, I find that Heerman is a temporary employee who is ineligible to vote in the election. Thus, I shall exclude her from the appropriate unit.

The Assistant to the Production Manager

In their post-hearing brief, the Joint Petitioners urge that the assistant to the production manager Meredith Brittain ("Brittain") lacks a community of interest with the other production employees and should be excluded from the appropriate unit. This issue was not specifically raised during the hearing. Thus, I note that the Employer has not taken a position with respect to Brittain's inclusion or exclusion in the unit.

The record merely shows that although the Employer considers Brittain a production employee, Brittain's job classification is not included in any of the seven categories that comprise the production staff, and she performs some clerical duties. The record evidence is factually insufficient to allow any determination of Brittain's job duties, skills, and community of interest with the other production employees. Thus, I will allow her to vote subject to challenge.

The Voting Eligibility Formula

As stated above, although the parties agree that the part time employees should be included in the appropriate unit, they disagree about the formula that should be used to determine the eligibility of the part time employees to vote in the election. The Joint Petitioners contend that the proper formula is the one used by the Board in *Davison-Paxson Co.*, supra, while the Employer urges the use of the formula in *Julliard School*, supra. In devising eligibility formulas, to fit the unique conditions of any particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *DIC Entertainment, L.P.*, 328 NLRB 660 (1999) citing *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). The Board has sought to be flexible in devising eligibility formulas in various entertainment industries. *DIC Entertainment*, supra. Because of the similarities herein to the facts involved in *Julliard School*, 208 NLRB 154 (1974), I find the formula used by the Board to determine voter eligibility in *Julliard School* to be applicable to the instant case.

Like the circumstances in *Julliard School*, the record shows, and I find, that the Employer has a nominal full time staff and relies upon the use of part time employees to accomplish its mission. Thus, the Employer produces an average of 14 stage shows per year including commercial and educational productions. In doing so, the Employer uses the skills of carpenters, scenic artists, electricians, props employees, sound department employees, costumers/wardrobe, and the running crew. The part time employees used to supplement the full time staff perform about one-third of the work. The Employer draws from a pool of part time employees that includes the same employees on a regular basis. The Employer maintains the personnel records of these employees for three to four years before discarding them if the employee has not worked a show in the meantime. The part time employees work similar hours in the same places, use the same tools and materials, take the same lunches and breaks, and receive the same employee benefits as the full time production employees. In addition, the part time employees work alongside the full time staff and attend the same Employer-sponsored social events.

The Joint Petitioners contend that the proper formula is the one contained in *Davison-Paxson* frequently relied upon in other situations by the Board for on-call employees. However, in recognition of the variables involved in producing shows on three stages and the vagaries of scheduling work with the attendant fluctuations in manpower requirements, the Joint Petitioners request a modified *Davison-Paxson* formula that looks back two quarters prior to the eligibility date and would allow employees to vote if they averaged 4 hours of work per week or 52 hours in either of the two preceding quarters. In *Davison-Paxson*, the employer's business involved retail sales that was relatively continuous. The need for supplemental "on-call" employees varied from time to time but was possible to occur at any given time. In this case, the Employer's need for the part time employees can only occur during certain periods of time, and can vary by department and scale of the show. Thus, in view of the fact that the manpower requirements involved in producing stage shows differs in nature from other business operations such as retail sales or the construction industry, it appears that the *Julliard School* formula, which was applied by the Board to an employer engaged in producing theatrical shows, is more appropriate under the facts of this case. The *Julliard School* formula, which takes into consideration a larger time frame than the one in *Davison-Paxson* (as the Joint Petitioners agree is necessary by their modification to the *Davison-Paxson* formula), would meet the Board's direction to permit optimum employee enfranchisement and free choice, without allowing those with no real prospect of future employment to vote. *DIC Entertainment*, supra. Accordingly, I find that those part time employees who are eligible to vote in this election are those that have worked on at least two productions for a total of 40 hours during the year prior to the eligibility date or who have worked a total of 120 hours during the past two years. *Julliard School*, supra.

The Showing of Interest

The Employer contends that the Joint Petitioners must establish the requisite showing of interest among the employees in the unit found appropriate herein, excluding the department heads that were found to be statutory supervisors. The Joint Petitioners, on the other hand, contend that the showing of interest is based upon the number of employees in the unit at the time the petition is filed.

Under Section 9(c)(1)(A) of the Act, the Board is required to investigate any petition which alleges that a "substantial number" of the employees desire an election. By administrative rule[ii], a showing of interest of 30 percent of the employees in the appropriate unit is the minimum requirement to invoke the Board's process. *Pearl Packing Co.*, 116 NLRB 1489 (1957). The purpose of the "30 percent" rule is enabling the Board to determine whether or not the filing of the petition warrants the expenditure of the Government's resources. *Pike Co*., 314 NLRB 641 (1994); *S.H. Kress Co*., (137 NLRB 1244 (1962). Thus, the showing of interest is an administrative matter and not subject to litigation. *O.D. Jennings & Co*., 68 NLRB 516 (1946); *General Dynamics Corp.*, 175 NLRB 1035 (1969).

[ii] See Section 101.18(a) of the Board's Rules and Regulations.

The Joint Petitioners rely upon *Pike Co., supra*, to urge that the required showing of interest was based upon the unit at the time it filed the instant petition. I note that the Joint Petitioners contend that there are 21 employees in the appropriate unit as indicated on the face of the petition. It is clear that the Board's holding in *Pike Co*. pertained to the showing of interest requirement in the construction industry. However, the Employer is engaged in the entertainment industry. Accordingly, the Joint Petitioners reliance upon *Pike Co*. is inapposite.

Although the unit I have found appropriate herein is broader than the unit initially sought by the Petitioner, I will not dismiss the petition because the Petitioner appears to be willing to proceed to an election in any unit found appropriate. Accordingly, the Decision and Direction of Election is conditioned upon a demonstration by the Petitioner within 10 days from the date of the Decision that an adequate showing of interest exists in the broader unit. Moreover, if the Petitioner does not wish to participate in an election in the broader unit, it will be permitted to withdraw the petition upon written notice to the Regional Director within seven days from the date of this Decision. *Sears, Roebuck and Co.,* 182 NLRB 609, 610 fn. 3 (1970).

CONCLUSION

Based upon the record as discussed above, I find the above-described unit to be the appropriate unit for collective bargaining. I further find that department heads McGarvie, Lichon, Lederle, and Klein are supervisors as defined by the Act. Similarly, I find the "grant" intern to be a temporary employee and exclude her from the appropriate unit. Because the employees of the Costume Exchange are separately employed and not sought by the Joint Petitioners, I exclude them from the unit as well. Finally, the eligibility formula to be used is the one set forth by the Board in *Julliard School*, supra.

There are about 85 employees in the unit.

177-8501
177-8520
177-8260
177-1650
324-0125 et seq.
324-2000
324-4020-1400
362-6718
362-6734
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